**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-1585**

State of Minnesota,
Respondent,

vs.

Justin Scott Sehr,
Appellant.

**Filed September 7, 2021**
**Affirmed**
**Hooten, Judge**

Cottonwood County District Court
File No. 17-CR-20-57

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Nicholas A. Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Florey, Judge.

**NONPRECEDENTIAL OPINION**

**HOOTEN**, Judge

Appellant challenges his gross misdemeanor conviction for driving while impaired (DWI) test refusal, arguing that there is insufficient evidence in the record to support the

jury's guilty verdict. Because the state presented sufficient evidence to support the verdict, we affirm.

## FACTS

This case arises out of appellant Justin Scott Sehr's refusal to submit to a breath test and his subsequent conviction for that refusal. In February 2020, Windom Police Officer Ryan Hillesheim pulled over Sehr after following his car and watching him make a right turn from the wrong lane. Officer Hillesheim testified that, upon approaching the vehicle and speaking with Sehr, he observed that Sehr rolled down his manual car window slowly, spoke with slurred speech, and had watery, bloodshot eyes. After Sehr admitted that he had been drinking, the officer asked him to complete some field sobriety tests. Officer Hillesheim testified that he had to grab Sehr as he stepped out of the car to prevent him from falling over, as Sehr's balance was "extremely poor." According to Officer Hillesheim, Sehr attempted to perform two field sobriety tests but could not complete either, leading Officer Hillesheim to stop the tests because Sehr was not following instructions and was too unstable to safely stand on his own. Officer Hillesheim attempted to administer a preliminary breath test (PBT), but Sehr could not provide a sample because of his intoxication.

After Officer Hillesheim concluded that Sehr was impaired, he arrested Sehr for driving while impaired and took him to the Cottonwood County jail. There, he read Sehr the implied consent advisory and asked whether Sehr would submit to a breath test. Sehr conveyed confusion about the requirement to take the test and whether he had taken it, ultimately declining to take the test.

The state charged Sehr with DWI test refusal in violation of Minn. Stat. § 169A.20, subd. 2(1) (2018). The state later amended the complaint to add a charge of third-degree DWI in violation of Minn. Stat. § 169A.20, subd. 1(1) (2018). After trial, a jury found Sehr guilty of both counts, and the district court convicted and sentenced him for the DWI test refusal. Sehr appeals. The state did not file a brief, and we ordered the case to proceed under Minn. R. Civ. App. P. 142.03.

**DECISION**

Sehr contends that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that he was unwilling to take the DWI breath test. Sehr argues that the evidence instead supports a reasonable inference that he was confused about the need for the breath test because he believed he had completed it when Officer Hillesheim tried to administer the PBT before arresting him. Under Minn. Stat. § 169A.20, subd. 2(1), "[i]t is a crime for any person to refuse to submit to a chemical test . . . of the person's breath under section 169A.51 (chemical tests for intoxication)." The state must prove that a defendant intended to refuse the test (i.e., that he was actually unwilling to test) when he failed to submit to it, rather than that he was willing but incapable of submitting. *State v. Ferrier*, 792 N.W.2d 98, 101-02 (Minn. App. 2010), *review denied* (Minn. March 15, 2011). "[R]efusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances." *Id.* at 102. The jury found that Sehr intended to refuse the breath test.

A conviction may be based on either direct or circumstantial evidence. *See State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015). "[D]irect evidence is [e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (alteration in original) (quotation omitted). We review the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). We assume that the fact-finder disbelieved any evidence that directly conflicted with the verdict, and we will affirm the district court if the remaining evidence supports the verdict beyond a reasonable doubt. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016).

But when direct evidence fails to support guilt for every element of the charged offense, we review whether the evidence circumstantially supports guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). In doing so, we first identify the circumstances proved by the state, viewing the evidence in the light most favorable to the conviction and assuming that the fact-finder "disbelieved any evidence to the contrary." *Ferrier*, 792 N.W.2d at 102. We next examine the reasonableness of all factual inferences that might be drawn from the circumstances proved, which "must be consistent with guilt and inconsistent with any hypothesis except that of guilt." *Id.* We conclude that the circumstantial evidence supports the jury's finding that Sehr intended to refuse the breath test.

Here, the state presented an audio recording and written transcript of Officer Hillesheim asking Sehr if he would submit to the test. Early in the conversation, Sehr

seems confused, asking the officer to repeat his explanation of the breath test and saying that he did not understand the explanation. Once Officer Hillesheim repeated the explanation, they had the following exchange:

> SEHR: To refuse it is a crime?
> OFFICER HILLESHEIM: It's a crime. Will you take the breath test?
> SEHR: No.
> OFFICER HILLESHEIM: Ok
> SEHR: Did I just not did I did I just I… did do the breath test. Am I wrong?
> OFFICER HILLESHEIM: Ok. Nope this one is the breath test.
> SEHR: That's a crime.
> OFFICER HILLESHEIM: That's not a breathalyzer breath test.
> SEHR: I just did the breath test didn't I?
> OFFICER HILLESHEIM: No
> SEHR: I did
> OFFICER HILLESHEIM: Ok.
> SEHR: I did do the breath test.
> OFFICER HILLESHEIM: Ok. Will you take the breath test?
> SEHR: What?
> OFFICER HILLESHEIM: Will you take the breath test?
> SEHR: Did I just not?
> OFFICER HILLESHEIM: Not this one. Not this one.
> SEHR: No
> OFFICER HILLESHEIM: You won't take the breath test?
> SEHR: No.
> OFFICER HILLESHEIM: Ok. I'm done with it then.

Even if Sehr was at first confused about whether he had taken the test, Officer Hillesheim clearly told Sehr four times that he had not taken the breath test and warned Sehr that it was a crime to refuse. Sehr twice refused the test at the end of the exchange. Viewing the evidence in the light most favorable to the verdict, this dialogue between Officer Hillesheim and Sehr is sufficient to support the jury's determination that Sehr willingly refused to take the breath test. This evidence does not support a reasonable

inference that Sehr was confused at the end of this conversation, and instead supports the reasonable inference that Sehr was actually unwilling to take the test despite Officer Hillesheim's repeated explanations that he needed to do so.

In his pro se supplemental brief, Sehr also argues that because a video recorded in Officer Hillesheim's squad car shows that Sehr used the correct turn lane, the officer lacked probable cause to stop him and used untrue statements to incriminate him, violating his rights. Sehr did not raise this objection to the district court, and we do not consider matters not argued below. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Also, the video that Sehr references was not entered into evidence and is not in the record on appeal, so we will disregard the reference. *See AFSCME, Council No. 14 v. Scott Cty.*, 530 N.W.2d 218, 222-23 (Minn. App. 1995), *review denied* (Minn. May 16 and June 14, 1995).

**Affirmed.**